

<sup>1</sup> The name “Manuel Mercado Mendoza” is used in the captions of the regular hearing transcript and the Award. The Application for Hearing filed on June 12, 2008, shows claimant’s name as “Manuel Mercado M.” Claimant’s Application for Preliminary Hearing filed on September 3, 2008, uses the name “Manuel Mercado.”

a 2% functional impairment for his right leg injury. The Award separately computes permanent partial disability (PPD) for the right leg and the back, then totals the two amounts to arrive at claimant's total Award.

Claimant raises the issue of the nature and extent of disability. Claimant argues that Dr. Murati's ratings are the most credible and therefore claimant should be compensated based on a 12% impairment to the right leg, a 5% impairment to the left leg, and a 10% whole body impairment for the lumbar spine.

Respondent argues that claimant's application for review was untimely filed and should accordingly be dismissed for lack of jurisdiction. In the alternative, respondent argues the ALJ's Award should be affirmed.

The issues for review by the Board are:

- (1) Does the Board have jurisdiction?
- (2) What is the nature and extent of claimant's disability?

#### **FINDINGS OF FACT**

Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings:

Manuel Mercado Mendoza worked for respondent since September 10, 1998. His job required pushing empty boxes. On April 8, 2008, claimant was walking in a parking lot when he was struck by a pick-up truck. Claimant was thrown approximately 10 feet and injured both knees and his low back. The parties agreed this claim is compensable. Neither work disability nor permanent total disability is alleged.

After his accidental injury, claimant experienced constant pain in his right knee extending to his toes, and difficulty climbing ladders, standing, running, and kneeling. Claimant claimed he had constant pain in his back and was unable to walk, stand or lay down without having increased pain. Twisting and bending also caused pain.

Claimant testified he had problems with his left knee after the accident. However, he received an injection in the left knee and it is now doing fine.

Claimant received treatment from a number of physicians, including Dr. Varinder Gill, whose treatment included a series of Synvisc injections in the right knee and one injection in the left knee; Dr. Suhall Ansari, whose treatment included a September 11, 2009 right knee arthroscopy with medial meniscectomy of the posterior half of meniscus complex tear, abrasion chondroplasty of the medial femoral condyle, the lateral tibial

condyle, and the patella, and lateral release; and Dr. Terrance Pratt, who prescribed diagnostic testing and conservative treatment.

Three medical witnesses provided testimony regarding claimant's permanent impairment of function:

(1) Based on the *AMA Guides*<sup>2</sup>, Dr. Pratt provided a rating for the low back of 3% permanent functional impairment to the body as a whole. Dr. Pratt did not offer any opinions regarding impairment in claimant's lower extremities.

(2) Based on the *AMA Guides*, Dr. Pedro Murati rated claimant's right leg at 12% which converts to a 7% whole person impairment. Dr. Murati found a 5% impairment to the left leg, which converts to a 2% whole person impairment. Dr. Murati also found a 10% whole body impairment for claimant's lumbar spine. Using the combined values chart, Dr. Murati found the impairments for both legs and the low back combine for an 18% permanent functional impairment to the whole person.

(3) Dr. John Babb was appointed by the ALJ to perform a neutral medical evaluation. Based on the *AMA Guides*, Dr. Babb rated claimant's right knee at 2% for status post arthroscopy with partial medial meniscectomy; 0% for claimant's left knee pain; and 5% whole person impairment for claimant's low back pain. Neither Dr. Babb's narrative report nor his deposition testimony combined the back and right leg ratings to an aggregate whole person impairment.

The ALJ entered the Award on February 22, 2012. It was received in the Division offices in Topeka on February 23, 2012. The Award itself indicates the original Award went to the Director and that copies went to Stanley R. Ausemus and Shirla R. McQueen, counsel of record for claimant and respondent respectively. The Award does not specify in what manner it was transmitted to counsel. However, the Division records indicate that the Award was faxed to claimant's counsel at 9:20 a.m. on February 22, 2012 and was faxed to respondent's counsel two minutes later. Claimant's Award was faxed to 1-866-342-7400, which claimant's counsel indicated at oral argument was a toll free fax number to his law office. There is no dispute that respondent's counsel received her copy of the Award on February 22, 2012.

Counsel for claimant represents he did not receive the Award until Friday, April 27, 2012. On April 27, 2012, an e-mail was sent by Ms. Kathleen Ausemus, the office manager for Mr. Ausemus' law office, to Ms. Mary Richardson, the legal assistant in the ALJ's office, inquiring about the status of the Award. Ms. Richardson responded by e-mail that copies of the Award were sent to Mr. Ausemus and Ms. McQueen on February 22,

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<sup>2</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *AMA Guides* unless otherwise noted.

2012. Ms. Richardson again faxed the Award to Ms. Ausemus on April 27, 2012. The Award was received by the office of claimant's counsel on April 27, 2012, and claimant filed an application for Board review on May 2, 2012.

Mr. Ausemus stated to the Board at oral argument on August 22, 2012, and in correspondence to the Board dated April 30, 2012, that he did not receive the Award until April 27, 2012. An affidavit from Kathleen Ausemus was provided to the Board which expressed her belief, based on established procedures in that office, the Award previously faxed did not arrive in Mr. Ausemus' office.

#### PRINCIPLES OF LAW

Pursuant to K.S.A. 44-551(i)(1), all final orders, awards, modification of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the Board upon written request of any interested party within 10 days.

Pursuant to K.S.A. 44-525(a) and K.A.R. 51-18-2(a), for purposes of Board review, the effective date of an ALJ's award shall be the date following the date noted on the Award.

K.A.R. 51-18-2(b) provides that an application for Board review shall be considered as timely filed if received in the central office or one of the district offices of the Division on or before the tenth day after the effective date of the Award.

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

In *Bryant*<sup>3</sup>, the Kansas Supreme Court stated:

If a worker sustains only an injury which is listed in the -510d schedule, he or she cannot receive compensation for a permanent partial general disability under -510e. If, however, the injury is both to a scheduled member and to a nonscheduled portion of the body, compensation should be awarded under -510e.

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<sup>3</sup> *Bryant v. Excel*, 239 Kan. 688, 689, 722 P.2d 579 (1986).

If the injuries from an accident include both a scheduled member and a nonscheduled portion of the body, all the disabilities should be combined and compensation should be awarded for a nonscheduled whole body permanent impairment.<sup>4</sup>

### ANALYSIS

The effective date of Judge Fuller's Award in this claim was February 23, 2012, the day after the date noted on the Award. Claimant's Application for Review by the Workers Compensation Appeals Board was filed on May 2, 2012, long after the 10-day appeal time had expired. The Board, however, finds that claimant's counsel did not receive the Award on the day it was faxed to him by the ALJ's office. Although the Award was faxed to claimant's counsel on February 22, 2012, and the number to which the Award was transmitted was a toll free fax number to Mr. Ausemus' office, neither the Award nor any other notification that the Award had been entered was received by claimant's counsel until Friday, April 27, 2012.

In *Nguyen*<sup>5</sup>, the ALJ entered an award and sent a copy to both counsel by United States mail. The copy mailed to claimant's counsel was sent to the correct address in Emporia, KS, but the ALJ's office mistakenly used a Topeka, KS zip code. By the time claimant's attorney received the award, the 10-day appeal time had expired. Claimant's attorney filed an application for Board review within 10 days following her receipt of the award. The Board dismissed the application for review for lack of jurisdiction, however, the Kansas Supreme Court reversed, holding that due process required that the 10-day appeal time was tolled, noting "the filing of an award is not notice to the parties; it is the mailing of the award and receipt of the award by the parties that constitutes notice."<sup>6</sup>

In *Johnson*<sup>7</sup>, the ALJ entered an award and a copy was mailed to both counsel. Although the correct address was used by the ALJ's office, the award never arrived in the office of claimant's counsel. Claimant's counsel learned of the decision on the last day an application for Board review could be timely filed. As a result claimant's counsel was unable to contact his client to secure authorization for an appeal. An application for Board review was filed beyond the appeal time. Relying on *Nguyen*'s due process analysis, the Court ruled that the lack of actual receipt of notice that the decision had been entered by the ALJ, the 10-day appeal time was tolled until notice was received by claimant's counsel. The *Johnson* Court noted:

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<sup>4</sup> See *Goodell v. Tyson Fresh Meats*, 43 Kan. App. 2d 717, 235 P.3d 484 (2009); *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 200 P.3d 479 (2009).

<sup>5</sup> *Nguyen v. IBP, Inc.*, 266 Kan. 580, 972 P.2d 747 (1999).

<sup>6</sup> *Nguyen*, 266 Kan. at 589.

<sup>7</sup> *Johnson v. Brooks Plumbing, LLC.*, 281 Kan. 1212, 135 P.3d 1203 (2006).

We also are not persuaded that workers compensation claimants and their counsel will routinely misrepresent the arrival dates of mailed ALJ awards. Counsel, in particular, as officers of the court, have responsibility to be candid about this and all other facts.<sup>8</sup>

In this claim the only information before the Board is that, despite the fact that the ALJ's office properly faxed the Award to claimant's counsel on February 22, 2012, neither the Award nor notice that an Award had been entered, was received by claimant's counsel until April 27, 2012. Claimant's counsel and his office manager represent that, for whatever reason, the Award was not received in their office when it was originally faxed. The Board has no reason to doubt the representations made by Mr. Ausemus or his office manager. On the contrary, Mr. Ausemus is an attorney licensed to practice law in the state of Kansas and is an officer of this administrative tribunal. He is well known to the Board and there is no indication that he has been anything other than completely truthful in this matter. As noted by respondent's counsel at oral argument there is "no reason to disbelieve" the representations of claimant's counsel on this issue. The Board agrees.

Accordingly, the Board finds under the circumstances of this claim the 10-day time limit to request Board review of the ALJ's Award was tolled until April 27, 2012; that the application for Board review was therefore timely filed; and the Board has jurisdiction to review the Award.

With regard to the nature and extent of claimant's disability, the Board agrees with the ALJ that the ratings of the neutral physician, Dr. Babb, should be accorded greater weight than the ratings of Drs. Pratt and Murati. The Board therefore adopts the findings of the ALJ that, as a consequence of the accidental injury, claimant sustained no impairment of function to the left leg, a 2% impairment of function to the right leg, and a 5% impairment to the whole person for the lumbar spine.

However, the Award was incorrectly calculated. As noted above, the claimant's right leg rating should have been converted to a whole body rating, then combined with claimant's body as a whole rating for the low back. The Award should then have been computed based on the aggregate impairment to the whole person, rather than calculating separate awards for the low back and right leg and then adding the two awards together.

Unfortunately, Dr. Babb was not asked to combine his two ratings. The portions of the AMA *Guides* concerning converting leg ratings to whole body ratings and combining ratings were not placed into the record. Generally, a party may not rely on portions of the

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<sup>8</sup> *Johnson*, 281 Kan. at 1217 [citing Kansas Rules of Professional Conduct, KRPC 3.3 (candor toward tribunal) and KRPC 3.1 (meritorious claims)].

AMA *Guides* unless they are placed into evidence.<sup>9</sup> However, in *McGrady*<sup>10</sup> the Board allowed use of the AMA *Guides*' conversion chart, even though it was not in the record, because the conversion chart did not add to the evidence in the record. The Board noted in *McGrady*:

The evidence as to the upper extremity rating is a part of the record. The use of the AMA conversion chart does not add evidence to this record. The upper extremity rating was a part of the doctor's testimony and the ALJ followed the accepted procedure for converting an extremity rating to a general body rating. In addition, he used the procedure which the legislature in effect approved when it mandated use of the AMA *Guides*. K.S.A. 44-510e.

The Board has also considered the AMA *Guides*' combined values chart to arrive at a total impairment of function when two or more ratings must be combined.<sup>11</sup>

Under the AMA *Guides* claimant's impairment of 2% to the right leg converts to a 1% whole person. Combining the 1% whole body with the 5% whole person impairment for the lumbar spine results in a total of 6% permanent impairment to the whole body. Claimant's entitlement to PPD in this claim should be based on that impairment and the Award is accordingly modified.

#### **CONCLUSIONS OF LAW**

(1) The Board has jurisdiction review the ALJ's Award.

(2) The ALJ's Award is modified to provide for PPD based on a 6% whole body permanent impairment.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>12</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

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<sup>9</sup> *Durham v. Cessna Aircraft Co.*, 24 Kan. App. 2d 334, 945 P.2d 8, rev. denied 263 Kan. 885 (1997); *Reiter v. State of Kansas*, No. 1,009,450, 2006 WL 931065 (Kan. WCAB Mar. 31, 2006).

<sup>10</sup> *McGrady v. Delphi Automotive Systems*, No. 199,358, 1998 WL 229871 (Kan. WCAB Apr. 6, 1998).

<sup>11</sup> See, e.g., *Granger v. Great Western Dining Service*, No. 231,730, 2000 WL 1523784 (Kan. WCAB Sep. 29, 2000).

<sup>12</sup> K.S.A. 2007 Supp. 44-555c(k).

**AWARD**

**WHEREFORE**, the Board finds that the Award of ALJ Pamela J. Fuller dated February 22, 2012, is hereby modified to provide PPD to claimant based on a 6% permanent impairment of function to the body as a whole. The Award is affirmed in all other respects.

Claimant is entitled to 24.90 weeks of permanent partial disability compensation at the rate of \$334.81 per week or \$8,336.77 for a 6% functional disability which is ordered paid in one lump sum less amounts previously paid.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January, 2013.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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